

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WARREN LEE JOHNSON,

Defendant-Appellant.

UNPUBLISHED

September 13, 2002

No. 235484

Isabella Circuit Court

LC No. 95-007400-FC

Before: Whitbeck, C.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Defendant Warren Lee Johnson appeals by delayed leave granted the order denying his motion for relief from judgment. We affirm.

I. Procedural History

A jury convicted Johnson of armed robbery,¹ first-degree home invasion,² and felony-firearm.³ The trial court sentenced Johnson as a fourth habitual offender to concurrent terms of 300 to 450 months and 160 to 240 months, and a consecutive two-year term for felony-firearm. On appeal, Johnson argued that the police lineup was extremely suggestive, trial counsel was ineffective for failing to challenge the lineup, the trial judge should have been disqualified based on his previous representation of defendant, and the sentence was disproportionate. This Court affirmed in an unpublished, per curiam opinion.⁴ The Supreme Court denied leave to appeal.⁵

Johnson later filed a motion for relief from judgment in the trial court, arguing that the jury instructions for home invasion were erroneous, and he was denied the effective assistance of trial and appellate counsel. The trial court denied the motion, finding that the new criminal jury

¹ MCL 750.529.

² MCL 750.110a(2).

³ MCL 750.227b.

⁴ *People v Johnson*, unpublished per curiam opinion of the Court of Appeals, issued October 13, 1997 (Docket No. 192067).

⁵ *People v Johnson*, 459 Mich 856 (1998).

instructions for home invasion were not available until after trial, and the jury instructions that were given were proper. The trial court also held that Johnson should have raised his ineffective assistance of trial counsel argument on direct appeal, and a difference of opinion on trial strategy did not constitute ineffective assistance of counsel.

This Court granted Johnson's delayed application for leave to appeal. He argues that the trial court erred in failing to give the standard instruction on first-degree home invasion that requires the house to be occupied when defendant was present. He contends that the reasonable doubt instruction improperly allowed the jury to convict him on the basis of only a fair doubt. He claims that his trial counsel was ineffective in conceding his guilt of breaking and entering and failing to object to the jury instructions. He maintains that his appellate counsel was ineffective in failing to raise these issues on appeal.

The prosecutor responds that the first-degree home invasion instruction was proper because the jury convicted Johnson on the basis that he was armed, not the alternative factor that applies when another person is present. The prosecutor contends that the reasonable doubt instruction was identical to CJI2d 3.2(3), and has been approved by this Court. Further, the prosecutor posits, Johnson was not denied the effective assistance of counsel. According, in the prosecutor's view, the trial court did not err in denying the motion for relief from judgment.

II. Standard Of Review

"A trial court's grant of relief from judgment is reviewed generally for an abuse of discretion."⁶

III. Relief From Judgment

When moving for relief from judgment, MCR 6.508(D) places the "burden of establishing entitlement to the relief requested" on the defendant. A court may not grant relief if the motion "alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision[.]"⁷ If the issue could have been raised previously, the defendant must prove "good cause for failure to raise such grounds on appeal or in the prior motion," as well as "actual prejudice from the alleged irregularities that support the claim for relief."⁸ In relevant part, the court rules define "actual prejudice" to mean that

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

* * *

⁶ *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001).

⁷ MCR 6.508(D)(2).

⁸ MCR 6.508(D)(3).

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case^[9]

We agree with the prosecutor that Johnson has failed to demonstrate the actual prejudice necessary to grant him relief.

The charge against Johnson relied on the fact that he was armed while he was present in the dwelling. Johnson was not prejudiced by the trial court's failure to instruct the jury on the alternate grounds that another person was present in the dwelling.¹⁰ Additionally, the reasonable doubt instruction was consistent with CJI2d 3.2(3), and therefore not erroneous.¹¹

Johnson has also failed to show that he was deprived of the effective assistance of trial or appellate counsel. There was no meritorious issue to raise regarding the jury instructions, and attorneys are not required to raise meritless issues.¹² Furthermore, when the evidence against a defendant is overwhelming, admitting guilt to a lesser charge can be an appropriate trial strategy, which may not be second-guessed by reviewing courts.¹³

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Kirsten Frank Kelly

⁹ MCR 6.508(D)(3)(b).

¹⁰ CJI2d 25.2a(5).

¹¹ See *People v Snider*, 239 Mich App 393, 420-421; 608 NW2d 502 (2000).

¹² *Id.* at 425.

¹³ See *People v Wise*, 134 Mich App 82, 98-99; 351 NW2d 255 (1984).